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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 245

MILTON BLOOMBAUM,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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The State of Maryland, by Thomas B. Finan, Attorney General of Maryland and Robert F. Sweeney, Assistant Attorney General, Chief, Criminal Division, responds herein, as directed by this Honorable Court, to a writ of certiorari to the Court of Appeals of Maryland.

OPINION BELOW

Bloombaum v. State, 237 Md. 663, 207 A. 2d 651 (1965).

JURISDICTION

On March 15, 1965, the Court of Appeals of Maryland confirmed the conviction of Petitioner, Milton Bloombaum, of unlawful possession of a narcotic drug and a hypodermic

syringe and needle adapted for the use of habit forming drugs, in violation of Article 27, Sections 276(n), 277, 297 and 300 of the Annotated Code of Maryland (1957 Ed. and 1963 Cum. Supp.). A timely filed motion for reargument was denied on April 28, 1965.

Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C.A., Sec. 1257(3).

QUESTION PRESENTED

Whether the Court should grant the Writ.

STATEMENT OF THE CASE

The Petitioner, Milton Bloombaum, and Max A. Solomon were charged in a two count criminal information, filed by the State's Attorney for Montgomery County, Maryland in the Circuit Court for that County, with (1) unlawful possession of marihuana and (2) unlawful possession of a hypodermic syringe and needle adapted for the use of habit forming drugs (R. 6). The Petitioner filed a timely motion to suppress evidence seized as a result of a search of an automobile (R. 7), and the trial judge, who tried the case without a jury, heard testimony on the motion in the course of the trial.

The evidence showed that on April 16, 1963, at approximately 11:45 A.M., Lieutenant Harold A. Treadwell of the Montgomery County Police, who was accompanied by Officer Robert A. Peay, arrested Mr. Solomon while he was waiting at the office of Dr. John N. Andrews for a prescription for dilaudid, a narcotic drug (R. 7, 12). Mr. Solomon's car was parked across the street from the doctor's office, approximately 200 yards away, and the Petitioner, Milton Bloombaum, was seated behind the steering wheel (E. 7-8, 14).

Officer Peay, on instructions from Lieutenant Treadwell, left the doctor's office and walked to the automobile. The officer identified himself to the Petitioner and had a brief conversation with him (R. 9, 14). Shortly thereafter, Corporal Robinson, another policeman, arrived, and Mr. Solomon and the Petitioner, Bloombaum, were both arrested.

The two prisoners were taken to the detective bureau of the Silver Spring police station for questioning (R. 15). Mr. Solomon's automobile was also taken there and it was placed on the parking lot (R. 9). Almost two hours after the arrest, the automobile was searched, and under the front seat on the driver's side the police found a small quantity of marihuana, a hypodermic syringe and needles (R. 15, 20).

The motion to suppress was denied, as the trial judge found (a) that the arrest was legal and (b) that the resultant search of the automobile was made after a warrant for such search was obtained. Petitioner was convicted, fined $200.00, and sentenced to the Maryland Penitentiary for a term of four years. The Maryland Court of Appeals affirmed the conviction, holding that the arrest of the Petitioner was legal as that arrest had been made pursuant to a valid arrest warrant issued prior to the arrest.

REASONS FOR DENYING THE WRIT

The Respondent believes that there are two reasons why this writ must be denied.

The first reason is that the claim now being presented to this Court was never presented to the Court of Appeals of Maryland.

In his Brief to the Maryland Court of Appeals, Appellant questioned the legality of the search and seizure, not on the

basis that said search was made at a place and time too remote from the arrest to be incidental thereto, but on the basis that the arrest itself was illegal, the search therefore illegal, and the evidence obtained therefrom inadmissible.

In his Petition for Writ of Certiorari to this Court Petitioner questions whether the Maryland Court of Appeals

> "decided a Federal question of substance in a way not in accord with applicable decisions of this Court when it held that a search of an automobile not undertaken until almost two hours after the Petitioner who had occupied it had been arrested and been taken into custody to a police station and after the automobile had been taken to the police station as well, *was permissible as being incidental to the arrest.*"

No such holding was reached by the Maryland Court of Appeals, as is obvious from their four paragraphs per curiam opinion, reprinted at Appendix A in the Petition for Writ of Certiorari. No such conclusion was reached by the Maryland Court of Appeals because, as aforesaid, the question pertaining to the search of the automobile was not raised, and, indeed, it was conceded by both Appellant and Appellee before the Maryland Court of Appeals that the search of the automobile was made pursuant to a search warrant obtained for that purpose.

In the Statement of Facts in Appellant's Brief to the Maryland Court of Appeals, the following comment is made at page 2:

> "The Appellant was taken to Police Headquarters, where he was interrogated by Lt. Treadwell. A search warrant was then obtained by Det. Peay, to search the automobile in which the Appellant had been sitting, prior to his arrest."

In the State's Brief to the Maryland Court of Appeals, it states at page 3 thereof, in the Statement of Facts:

> "After the search warrant was issued, the automobile was searched by Detective Peay and he found the marijuana, hypodermic syringe and needle, which formed the basis of the charges of which Appellant was convicted."

That Statement of Facts continues, in illumining manner, as follows:

> "Detective Peay *then got another warrant for Appellant's arrest,* charging the possession of the items found in the automobile. Appellant was convicted and sentenced for the possession of these items, and from that judgment he appeals." (Emphasis supplied.)

Respondent says, therefore, that Appellant, having conceded the legality of the search of the automobile before the Court of Appeals of Maryland, now has no standing to raise that question in the instant Petition for Writ of Certiorari. Nor is this waiver by the Petitioner, who at that time was represented by competent counsel, affected by the decision of this Court in *Fay v. Noia,* 372 U.S. 391, as the instant proceeding involves appellate review of conviction, and *Fay* applies only to Federal habeas corpus proceedings.

Respondent's second reason for the denial of the Writ is even more persuasive, we believe, than the waiver point. Simply stated, the facts set out in the Petition for Writ of Certiorari are inaccurate and misleading.

Petitioner, in his motion, indicates that the search warrant, for the search of the automobile in question, was not obtained until *after* the search was made. This is a totally unsubstantiated assumption.

At page 4 of his Petition for Writ of Certiorari, Petitioner makes the following statement:

> ". . . Lieutenant Treadwell could not testify about the time when the second warrant, the search warrant,

was issued (R. 15), but Officer Peay was clear in his statement that the second warrant, presumably the search warrant, was not issued until *after* the automobile had been searched and the evidence found."

Petitioner, at that same page, in his footnote 1, sets forth the following testimony from the record:

"Q. Mr. Bloombaum was sitting in the driver's seat when you arrived at the scene? A. Yes sir.

"Q. And when you later looked and searched the car where were these, this syringe and dropper; where was that found? A. I found that right under the driver's seat right by where the left foot would be if he brought it back against the seat, sir.

"Q. To go back to the warrants again, I didn't hear you say for whom these warrants were obtained; the ones you personally obtained, those were both defendants? A. Yes, sir.

"Q. And Bloombaum and Solomon, and that was with possession? A. Yes, sir.

"Q. Of these syringe and needles. Now, was this after you had searched the car that you obtained that warrant? A. Yes, sir.

From all of Officer Peay's testimony, however, it is obvious that the warrant referred to in this extract of testimony was *not* the warrant for the search of the automobile, but a third warrant obtained by him, charging the Petitioner with the possession of marihuana, hypodermic syringe and needle found in the automobile at the time of the search.

At page 104 of the transcript of testimony before the trial judge, Officer Peay testified as follows:

"Q. Did there come a time subsequent thereto when a search was made of the vehicle *pursuant* to a search warrant having been obtained? A. Yes, sir." (Emphasis supplied.)

Again, at page 115 of the transcript, Officer Peay testified as follows:

> "Q. Now, Detective, I believe you testified you yourself got a warrant, is that correct, or am I incorrect? A. Later on in the day, sir.
>
> "Q. What kind of warrant did you get? A. For having possession of narcotics.
>
> "Q. You got a warrant for possession of narcotics after you had arrested him? A. To the best of my knowledge, yes, sir. This was after investigation had been made."

It fully appears from all of the testimony before the trial court that three warrants were involved in this case:

1. The warrant for the arrest of the Petitioner which was obtained prior to his arrest, and used to arrest him. Both the trial court and the Maryland Court of Appeals sustained the validity of this warrant.

2. The warrant for the search of the automobile, which was obtained by the officers when the Petitioner declined to permit them to search the vehicle without such a warrant. The full record leaves no doubt that this warrant was obtained after the arrest and before the search of the car.

3. An additional warrant, obtained by Officer Peay, after the search of the motor vehicle, charging the Petitioner with possession of the narcotics and narcotic paraphernalia disclosed by the search of the car.

A full examination of this case can leave little doubt that the rights of Petitioner were fully protected in every regard.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied. The alleged violation of Petitioner's constitutional rights set out in the Petition was not only presented to the Maryland Court of Appeals but in fact Petitioner admitted to that Court the validity of the search which he now attacks.

In addition, from an examination of the transcript of the trial and the Briefs to the Maryland Court of Appeals, it is apparent that the search of the vehicle now objected to, was not made "incidental to the arrest" but was made on the authority of a search warrant obtained for that specific purpose.

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